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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of JESSE J. ESCOBEDO and DIANA FERNANDEZ.	
JESSE J. ESCOBEDO, Petitioner, v. DIANA FERNANDEZ, Appellant. BRENDA ESCOBEDO, Claimant and Respondent.	G050215 (Super. Ct. No. 09D011629) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kim Hubbard and Glenn Salter, Judges. Affirmed.

Sarieh Law Offices and Wail Sarieh for Appellant.

No appearance for Respondent.

In 2010, the family law court nullified the marriage of Diana Fernandez (Mother) and Jesse J. Escobedo (Father). That same year, Mother and Father's two biological children were taken into protective custody after Mother was arrested for felony child abuse. In 2011, the juvenile court entered a final custody order awarding Father sole physical custody of the children but allowing Mother monitored visitation once a week. The juvenile court awarded Mother and Father joint legal custody. A few months later, Father died, and the Orange County Social Services (SSA) placed the children in the care of Father's first ex-wife, Brenda Escobedo (Brenda). SSA did not initiate dependency proceedings. Desiring the return of her children, Mother filed an order to show cause (OSC) in the family court claiming the children had been abducted.

Over the next two years (2011-2013), the family court entered a series of orders that resulted in the following changes: (1) Brenda was officially joined in the family law case; (2) Brenda and Mother shared joint legal custody of the children; (3) the children were sent to therapy to deal with issues of grief and possible reunification with Mother; (4) Brenda and Mother attended a co-parenting class and in March 2013 agreed to a "parenting agreement" giving Mother unmonitored visitation time; and (5) in October 2013, Mother lost all visitation rights to her oldest child (the same child who suffered from Mother's earlier child abuse). During this time period the children resided with Brenda, however, our record does not contain any indication she was officially awarded primary physical custody of them.

In 2014, Mother hired an attorney who filed a motion to set aside all prior family court orders made between November 10, 2011, and October 4, 2013. She maintained the orders were void because the family court lacked jurisdiction to award custody to a nonparent. The family court denied the motion, concluding the orders were not void and any perceived error could have been the subject of timely filed appeals. We conclude the family court was right, and we affirm the May 15, 2014, order denying Mother's motion.

I

A. Marriage Nullity Proceedings

In December 2009 Father filed a petition to legally nullify his marriage to Mother (Case No. 09D011629). His petition stated the couple were married in September 2001 and separated January 4, 2004. The couple had two children, J.E., and D.E., who were then seven and four years old respectively. Father alleged the nullity was based on a "prior existing marriage." He requested joint legal and physical custody.

In addition, Father filed a declaration in December 2009 under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) stating the children resided with him from the date of separation, January 4, 2004 to 2008. The children resided with Mother starting in February 2009 and currently lived with her.

Mother did not respond to the petition, and the court granted Father's request to enter a default on March 30, 2010. On May 18, 2010, the family court entered a judgment of nullity based on evidence of a prior existing marriage. The family law trial judge, Judge Claudia Silbar, entered judgment using Judicial Council Form FL-180. In the section of the form devoted to child custody and visitation, the Judge Silbar handwrote the notation "the [j]uvenile [c]ourt has jurisdiction over [J. and D.'s] custody" and child support was payable through the department of child support services (DCSS). Judge Silbar noted the juvenile dependency case numbers for each child (DP019673 and DP019674).

B. The Dependency Proceedings

Our record on appeal does not contain any information regarding the basis for the dependency proceedings involving J. and D. (Case Nos. DP019673 and DP019674). In her opening brief, Mother explains that on April 9, 2010, before the court entered the above default judgment, she was accused of "corporal punishment on a child," she pled guilty on August 9, 2010, she served six months in jail, and she was

placed on three years probation. There are no record citations to support any of these purported facts.

Mother represents she was "released" in October 2010, and the children lived in Orangewood Children's Home (Orangewood) in April and May 2010. Once again, there are no record citations to support these factual claims.

The only document contained in the clerk's transcript on appeal, relating to the dependency proceedings, is a copy of custody order and final judgment (Judicial Council Form JV-200) entered by Judge Maria D. Hernandez on February 23, 2011. The order stated Mother and Father were not married. Judge Hernandez awarded joint legal custody to Mother and Father, but *sole physical custody* to Father. She noted the primary residence would be with Father, and she determined Mother could visit the minors as set forth on "[F]orm JV-205." Judge Hernandez terminated the juvenile court's jurisdiction over the minors. Form JV-205 specified Mother's visits would be *supervised* and limited to one time per week for two hours minimum.

Mother asserts she exercised her weekly monitored visits at New Alternatives, an agency that provided supervised visitation services. There is no evidence in our record to support this factual contention.

Father died on July 20, 2011. Mother claims she "attempted to recover her children without success" because New Alternatives would not permit visitation without "'legal papers.'" Mother asserted the social worker assigned to the dependency case claimed to lack jurisdiction over the children. Mother maintained she "had no choice but to ask for the assistance of the [s]uperior [c]ourt on October 31, 2011[,] to locate the children." The above factual claims are not supported by record citations.

C. Mother's OSC Regarding Child Abduction

Using the same case number as the marriage nullity family law proceedings (Case No. 09D011629), Mother filed an OSC regarding a child abduction. The OSC document is not part of our record.

Based on the reporter's transcript and minute order, we can deduce Mother's OSC requested assistance from the district attorney's office to locate her children. In her minute order, dated November 10, 2011, Judge Kim Hubbard stated she reviewed J.'s and D.'s dependency court records. Judge Hubbard ordered the Orange County District Attorney Child Abduction Unit "to assist in locating" the children. Judge Hubbard referred the matter to the juvenile court. The order stated, "Application to Commence Proceedings by Affidavit and Decision by Social Worker is forwarded to social services liaison this date. A copy of this minute order shall be forwarded to Deputy District Attorney, Jim Bacin."

i. Court Order Joining Escobedo

Two months later, on January 31, 2012, Judge Hubbard held a hearing on the court's own motion. Mother and Orange County Deputy Public Defender, Joaquin Nava, attended the hearing. Judge Hubbard began the hearing by stating she had received the report she requested from the social worker.

Judge Hubbard read the contents of the report into the record. It contained the following information: (1) Mother "'has an open juvenile court dependency case regarding her youngest child, Timothy [G.], going to [a Welfare and Institutions Code section 366.26] hearing and to terminate her parental rights[]'"; (2) social worker Jennifer Behen-Givens was assigned to Timothy's dependency case; (3) Behen-Givens was also assigned to the dependency case involving Timothy's older half-siblings (J. and D.) until it was terminated "'and Father received sole physical custody'"; (4) Behen-Givens "'has told Mother several times where all her children were placed'" and told Mother she must set up monitoring for visitation; (5) Mother had not "'exercise[d] her right to monitored visits'"; (6) J. and D. had been living safely with Brenda "'since [Father's] death, on July 20, 2011'"; (7) Mother misrepresented the facts to the district attorney and the family law court; and (8) Brenda plans to file for legal guardianship of the children in the probate court.

During a closed hearing, Mother testified that Behn-Givens did not give her a phone number or address for the children. She denied cancelling her monitored visitation, and asserted New Alternative required additional paperwork. Judge Hubbard informed Mother the juvenile court exit order was the only legal paperwork needed to set up monitored visitation.

Nava, who represented Mother in earlier proceedings, testified he contacted county counsel after Father's death and learned J. and D. were living with Brenda but that they did not have additional contact information. Nava opined Behn-Givens's "credibility is very questionable as to what has occurred in this case." Nava stated the public defender's office does not represent clients in family law matters, but he did not understand how Brenda, having no legal rights to the children, could be given physical and legal custody. He asked what procedure gave Brenda the right to decide what happened to the children, including whether they got to see their mother, when the court's order gave Mother legal custody of them.

Judge Hubbard replied that although the prior court order gave Mother joint legal custody, it was very specific about limiting physical custody and ordered once-a-week monitored visitation. Judge Hubbard stated that because Father was deceased, it would change the juvenile court order to say Mother had sole legal custody, and under the rules Mother had the right to know where her children were living, how they were doing in school, and whether there were medical issues, etc. The trial judge indicated she did not have enough information to make a ruling about physical custody. She noted the children were placed in Brenda's care and the order makes clear the juvenile court did not feel the children were safe with Mother when it gave Father sole physical custody.

Judge Hubbard stated custody should be determined by the juvenile court. When Nava reminded the trial judge that the dependency case was dismissed, she asked if counsel was going back to the juvenile court to reopen the case. Judge Hubbard stated the only matter before her was an OSC regarding child abduction. She repeated the

matter should be referred to the juvenile court. Nava asked Judge Hubbard to consider the issue of physical custody or refer the case to juvenile court because the children are living with someone "we really don't know much about."

Judge Hubbard stated she lacked the authority to force the juvenile court to reopen the case. She stated, "I will certainly say that the family court believes that the juvenile court needs to make a determination regarding the physical placement of the children due to the death of [Father] and the fact that I see no formal order placing these children with [Brenda]." The trial judge ruled the OSC, regarding child abduction, was defeated by evidence SSA placed the children with Brenda, the children were safe, and Mother was told where the children were located. Judge Hubbard stated Nava's issue about whether SSA had jurisdiction over the children to place them with Brenda needed to be reviewed by the juvenile court. She noted, "I don't know if they did an emergency order I'm unaware of. I can't answer the question." Judge Hubbard repeated she had insufficient information to make any order regarding physical custody, but she would issue an order stating Mother had sole legal custody as this point. Judge Hubbard stated she would order Brenda to provide the contact information needed for Mother to arrange for monitored visitation. On the record, the court denied the OSC for child abduction.

Judge Hubbard's minute order, dated January 31, 2012, shows she held an afternoon session during which she changed her mind and entered different orders. We were not provided with a copy of the reporter's transcript of the afternoon session.

The minute order stated, "The court vacates all prior orders made earlier this date. [¶] Court mistakenly sent this matter back to [j]uvenile [c]ourt which currently has no case pending. Court corrects that error in setting this matter for further hearing in that department. [¶] On the court's own motion, the [c]ourt joins . . . Brenda to this matter and orders [SSA] to give notice to [Brenda]. [¶] Court orders an [e]mergency [i]nvestigation to determine the alleged detriment to children if [M]other is granted

physical custody. Matter is continued to [February 14, 2012]." (Italics and bold omitted.)

In the limited record provided to this court, there is no evidence regarding what transpired, if anything, on February 14. It appears the next hearing was held over one month later on March 27, 2012.

ii. Court Order Granting Joint Legal Custody for Brenda and Mother

Our record contains a reporter's transcript, but no corresponding minute order, for the March 27, 2012, hearing. Mother and Brenda attended the hearing. Brenda was represented by counsel, Robert Curatola.

Curatola stated he was making arrangements with Mother to facilitate monitored visits at "Alternatives." Judge Hubbard stated she had read the reports and she commented it was good that Mother had been attending classes and complying with her probation terms. The trial judge stated, "But of course we're going to have to move slowly" because of "the history" and the children's best interests.

Next, Judge Hubbard stated on the record she would order that Mother and Brenda share joint legal custody of the children. Judge Hubbard stated Mother and Brenda would need to discuss decisions relating to the children, but if there was a dispute, Brenda "is going to make the final decision." The trial judge explained, "I think that's in accord with what I've got here from juvenile court and the history here."

Mother informed the trial judge that she would like to have visits with J. and D. at Alternatives because she was currently visiting Timothy there, and she wanted the children to see each other on Saturdays. The trial judge asked Brenda whether J. wanted to visit with Mother, explaining, "one of the recommendations . . . is she be allowed to refuse visitation." The court asked Brenda if her health insurance for the children would cover the cost of reunification counselors or therapists. Judge Hubbard cautioned Mother it may not be possible to repair her relationship with J., and they would not pressure J., but they would try involving a reunification counselor.

Mother stated she believed J, was upset because Mother could not console her after Father's death. Mother did not acknowledge another reason could be that Mother was physically abusive and the child was still afraid of her.

When Judge Hubbard asked the parties to work out a schedule for monitored visitation, Brenda stated D. also did not want to see Mother. Judge Hubbard stated both children may require therapy and asked Brenda to find out if Alternatives would provide a "reunification monitor" for visits or to talk to a therapist covered by the children's health insurance. Judge Hubbard asked Brenda, "[to find out from the therapist what] would be best in terms of bringing the children into therapy, bringing you into sessions, . . . setting up monitored visitation. They may say we need some therapy sessions first, that that would be in the best interests of the children."

Mother told Judge Hubbard about the status of Timothy's dependency case. She said the dependency court ordered reunification services and the case was scheduled for an 18-month review hearing.

Judge Hubbard asked Brenda's counsel to prepare an order regarding what was discussed at the hearing, including the decision Mother and Brenda would share joint legal custody. The judge reminded Brenda to give the therapist a full history regarding the children. She scheduled a hearing to take place on April 24, 2012. As mentioned above, our record does not contain any order reflecting the court's rulings.

iii. Court Order Regarding Counseling for the Children

Our record contains a reporter's transcript but no corresponding minute order from the April 24, 2012, hearing. Mother, Brenda, and Brenda's attorney attended the hearing. Judge Hubbard stated she had received a copy of the emergency investigation report. A copy of the report is not included in our record.

The reporter's transcript shows the author of the report, Dr. M.K. Gustinella, testified at the hearing. Gustinella stated she interviewed Brenda, Mother, J. (10 years old), and D. (six years old). She learned that when Brenda was married to

Father they had three children who are currently all adults. Gustinella spoke with the eldest daughter, Christine (24 years old). Brenda was not with Father at the time of his death.

With respect to Mother, Gustinella stated she looked at her criminal history, SSA records, and police reports. Gustinella also spoke with social worker Behen-Givens. After reviewing all the information, Gustinella concluded "there does appear to be a detriment."

Gustinella explained the children were adamant about not wanting to have physical contact with Mother. She opined, "There's a lack of trust. Their comments are that they have large, still active, memories of physical abuse directed to them by her; they do not feel safe in her presence even with a monitor; that they do not like or have fond memories of their mother, and they have no desire to see their mother."

Gustinella stated the children were happy and stable living with Brenda. She stated J. was the one who called Brenda and the social worker and voiced her desire to live with her. Gustinella testified, "[J.] wanted to go to live with [Brenda], as she remember[ed] Brenda as being a loving mother when she lived there with her father at an earlier time or knew of her at an earlier time, and essentially [saw] her as a kindly, nurturing mother being [*sic*]. So essentially they're very happy and stable in their current living arrangement."

Gustinella recounted "the original problem" occurred on April 14, 2010, when SSA substantiated physical abuse to the children. The children were taken into protective custody and initially placed with Father's sister. Gustinella stated Mother was arrested and charged with felony child abuse. Mother was currently on probation. Gustinella noted SSA was in the process of terminating Mother's parental rights with respect to the children's half brother, Timothy (two years old).

When the children were dependents, Gustinella reported the children and Mother received reunification services. Specifically, J. participated in a step-up program.

J. stated she was not interested in visiting with Mother and J. was not fond of visits. However, J. participated in the court-ordered monitored visits. Gustinella stated J. has been verbal about her fears of Mother.

In addition, Gustinella noted Mother delayed in addressing her anger management problem. Mother did not start a 52-week program until September 2011. Gustinella testified the social worker recalled Brenda had wanted custody of the children from the beginning and the children agreed she was their first choice. Gustinella noted the one thing that was not addressed in family maintenance was the need for counseling, and especially therapy for J. She opined, "there's this animosity and . . . the story has gotten frozen with heroizing [*sic*], kind of making the father, who's no longer alive, a hero in their minds" when he was not blameless. Gustinella recommended counseling for the children, and that with time therapy might lead to better communication and perhaps a relationship with Mother.

Judge Hubbard asked Brenda's attorney if they had made progress towards finding a counselor or found someone covered by the insurance plan. The trial judge reminded the parties that the counselor should be given a full history of what had happened to the children. She suggested the parties attend the first session without the children, to find out how to proceed in the children's best interests. Judge Hubbard repeated Gustinella's opinion that the initial emphasis in counseling should not be on reunification. The trial judge requested the counselor send reports regarding the children's progress and make recommendations on what steps should be taken next. It scheduled a hearing for July 17, 2012.

iv. Court Order Regarding Reunification Counseling Sessions

Although a court reporter was present at the July 17, 2012, hearing, we were not provided with a copy of the reporter's transcript. The court's minute order states Mother and Brenda's counsel were present, and the court heard Mother's testimony. The minute order states, "Counsel informs the court that the parties have

agreed that reunification counseling shall start on Saturday." Judge Hubbard specified the first counseling session would only be attended by Mother and Brenda, and she requested that the counselor send a report "which shall include any recommendations." The matter was continued to September 4, 2012.

v. Court Order to Submit Reunification Report

Although a court reporter was present at the September 4, 2012, hearing, we were not provided with a copy of the reporter's transcript. The court's minute order states Mother, Brenda, and her counsel were present. The court heard testimony from Mother and Brenda. It continued the matter to October 2, 2012, and ordered the parties to "bring a report from the reunification counselor . . . with any recommendations as to any phone calls."

vi. Court Order for Coparenting Class and Reunification Counseling

Although a court reporter was present at the October 2, 2012, hearing, we were not provided with a copy of the reporter's transcript. The court's minute order states both parties and Brenda's counsel appeared at the hearing and that the parties submitted a report. The minute order notes, "Upon the court's review of the report, it appears that the counselor recommended that the children participate in some [grief] counseling for the loss of their father." After considering the testimony of both parties, the court ordered that reunification counseling continue. It also ordered the parties to sign up for a "co parenting class at F.A.C.E.S." The minute order stated, "Once the reunification counselor says that phone calls are okay, the parties are to set those rules with the reunification counselor." The court ordered the parties to bring a status report from the counselor at the next scheduled hearing on November 27, 2012.

At the next hearing on November 27, Mother submitted documents showing she completed a child abuser treatment program and a parenting program. The minute order from this hearing states, "Court finds [Mother] is in compliance with the court's orders." The matter was continued to March 12, 2013.

vii. Court Adopts Coparenting Agreement

Although a court reporter was present at the March 12, 2013, hearing, we were not provided with a copy of the reporter's transcript. The court's minute order states that in the court's morning session the parties were referred to "Family Court Services for assistance with their custody and visitation issues and for unmonitored visitation." When the parties returned, the court adopted the parties' "partial parenting agreement reached today and ma[de] it the [c]ourt order[.]"

In addition, the court ordered the following: "Court orders that at any time [Brenda] has a reasonable suspicion that [Mother] is under the influence that she may request a drug test. Upon said request [Mother] is to take a drug test. If the test is negative, [Brenda] shall pay for it. If the test is positive, [Mother] shall pay for it." The court scheduled a review hearing for six months later (September 13, 2013), and indicated the "matter shall trail pending parties return from mediation."

Our record contains a copy of the Partial Parenting Agreement. The parties agreed Mother would care for the children every other weekend: Saturdays from noon until 8:00 p.m., and Sundays noon until 6:00 p.m. In addition, Mother would have visitation every Wednesday from noon until 7:30 p.m. starting March 16, 2013. Mother could call the children on her "non-custodial weekend" and every Tuesday evening, and other times by mutual agreement of the parties. The agreement provided a promise that the parties not make negative statements about the other party, not question the children about the other party, or use the children to communicate adult business. The parties agreed not to show the children court papers or expose them to disputes between the parties. Mother agreed to "remain clean and sober during custodial time" and not expose the children to "harmful situations." The parties agreed to return for further mediation on September 13, 2013. The September hearing was continued to October 4, 2013, based on court unavailability.

viii Court Order Modifying Visitation

Although a court reporter was present at the October 4, 2013, hearing, we were not provided with a copy of the reporter's transcript. The court's minute order stated Mother and Brenda attended the hearing and testified. The court dismissed an OSC without prejudice because the pleading was defective. Our record does not contain a copy of the OSC.

On its own motion, the court appointed Sheryl L. Edgar as counsel for J. and stopped all visitation between Mother and J. Mother could "resume" visits with D. for the time periods previously ordered. The court referred Brenda to the self-help center to obtain information about adoption. The matter was continued to December 6, 2013. Our record does not contain any further documents, minute orders, or reporter's transcript regarding the December 6 hearing or further proceedings before Judge Hubbard.

ix. Court Order Denying Motion to Vacate Prior Court Orders

The last minute order contained in our record is dated May 15, 2014, and refers to a motion heard before Judge Glenn R. Salter. Mother, now represented by counsel Wail Sarieh, filed a motion on January 13, 2014, to set aside all the prior custody orders involving Brenda. Although a court reporter was present at the hearing, we were not provided a copy of the reporter's transcript. In addition, our record does not contain a copy of the motion. The hearing was attended by Brenda, J.'s counsel, Mother, and Sarieh.

The minute order contains the following information: (1) Judge Salter received transcripts from the hearings before Judge Hubbard; (2) the parties discussed "whether the motion to set aside is proper or if an appeal should have been brought"; (3) the court noted Mother "invoked" the court's jurisdiction; and (4) Mother's counsel disagreed and the court heard argument from all the parties and their counsel. Judge Salter ruled, "The [c]ourt has reviewed the file and the transcripts and does not have a concept as to why the children were placed in the custody of . . . Brenda. However, from

a practical standpoint, it does not fault [SSA]. [¶] The [c]ourt finds there is evidence in the record that indicates Judge Hubbard could reasonably determine detriment under a clear and convincing standard and was acting in the best interest of the children. The order issued by Judge Hubbard is not a void order, but it could have been appealed and was not. [¶] [Mother's] motion to set aside [Judge Hubbard's] order as void pursuant to Code of Civil Procedure section 473, [subdivision] (d)[,] is denied. [¶] The [c]ourt inquires as to a temporary parenting schedule for [Mother]." The court ordered J.'s counsel to assist Mother and children with selecting a reunification therapist.

II

Mother's appeal is based on the following two theories: (1) Judge Salter erred in concluding the prior orders were not void because the family court lacked jurisdiction to award custody to a nonparent; and (2) custody of the children, as a matter of law, "automatically revert[ed]" to Mother simply because she is the only surviving parent. She is wrong.

With respect to her first argument regarding jurisdiction, Mother argues, "It has been well established" that the only way for Brenda to obtain custody was through guardianship proceedings. However, the single case Mother cites to support this argument does not help her. In *Scott v. Superior Court* (2009) 171 Cal.App.4th 540, 546 (*Scott*), father had been awarded sole legal and physical custody of his children. Father's girlfriend sought custody and visitation with father's biological children after the relationship ended and he and the children moved away. The court held, "The custody provisions of the Family Code apply only in proceedings that are generally, if not invariably, initiated by the parents of a child. Further, they have been held not to provide an independent basis for subject matter jurisdiction. [Citation.] A nonparent seeking custody therefore *lacks standing to initiate* a custody proceeding under the Family Code. A guardianship petition under the Probate Code is the only judicial means for a nonparent

to obtain custody when the *parents have not themselves initiated a custody proceeding*." (*Ibid.*, italics added.)

The *Scott* case is inapplicable here because Brenda did not initiate a custody proceeding in this case. Mother initiated the proceedings by filing the OSC in October 2011. Although Mother knew her children had not been abducted, she desired their return which would require modification of the juvenile court custody order. Essentially her OSC evolved into a child custody proceeding. Judge Hubbard, on her own motion, joined Brenda to the action. Mother does not suggest the court's joinder of Brenda to the existing action is the same thing as Brenda initiating a custody proceeding. Thus, Mother's legal authority holding nonparties lack standing to initiate a custody proceeding is inapt in this case.

The Family Code specifically gives a family court authority to award custody of a child to a third party or nonparent in custody proceedings in certain circumstances. (Fam. Code, § 3041; Cal. Child Custody Litigation and Practice (Cont.Ed.Bar 2011) §§ 13.2-13.4, pp. 481-483.) In apparent recognition of this well established body of case law, Mother provides the following commentary, "It might have been the case that the family court awarded the [non-parent] claimant herein custody based on [Family Code sections] 3040 and 3041. However, the custody provisions in the aforementioned codes do not apply in this context and do not provide independent basis for subject matter jurisdiction. Brenda does not have standing in this case. [¶] The custody provisions of the Family Code apply only in proceedings that are generally, if not invariably, initiated by the parents of a child."

We have already determined Mother (as the parent) initiated the custody proceedings in the family court. Her argument Brenda lacks standing is solely based on her mistaken belief Brenda was required to initiate a guardianship proceeding to obtain custody. Mother offers no other legal challenge to the court's reliance on Family Code

sections 3040 and 3041 to award Brenda joint legal custody.[1] A court's ruling is presumed to be correct, and the burden of demonstrating error rests squarely on the appellant. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.) An appellant may not simply make the assertion the trial court's ruling is erroneous and leave it to the appellate court to figure out why. Even when our standard of review is de novo, the scope of review is limited to issues that have been adequately raised and are supported by analysis. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Mother's failure to demonstrate any error in Judge Hubbard joining Brenda to the custody proceedings and awarding her joint legal custody compels an affirmance of Judge Salter's order.

Mother's second legal contention is also fatally flawed. She repeatedly maintains in the briefing that without a court finding she was an unfit mother, there was no lawful basis for the court's refusal to award her sole legal and physical custody of the children. Mother argues that upon Father's death, physical and legal custody should have automatically reverted back to her. However, all the legal authority she relies upon relates to custody orders arising from a family law court divorce decree. (See, e.g., *Schammel v. Schammel* (1894) 105 Cal. 258.) She offers no analysis or reason why this body of case law should also apply to custody orders generated by the juvenile court as a

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[1] "Family Code section 3041, subdivision (c), expressly anticipates that child custody might be granted under the Family Code to 'a [nonparent] who has assumed, on a day-to-day basis, the role of [a child's] parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time.' This is a codification of the de facto parent doctrine, which grants standing to persons who, like [Brenda], have come to function as parent to a child, even though not the child's natural parent. [Citation.] It would make no sense for the Family Code to permit such a person to be awarded custody, yet deny them standing to participate as a party in the custody proceeding itself." (*Erika K. v. Brett D.* (2008) 161 Cal.App.4th 1259, 1267, fn. omitted.) In addition, California Rules of Court, rule 5.24(c)(2) permits any person "who has or claims custody or physical control of any of the minor children subject to the action" to be joined as party to a custody action.

final judgment following termination of dependency proceedings (based on substantiated allegations of child abuse). We conclude this is a factual distinction that makes a difference.

As stated by Mother, "There is ample authority on what happens when the *custodial* parent dies *after a divorce decree*. Some states hold the right to custody reverts automatically to the surviving parent, unless he or she is proved unfit; that is the majority rule and is followed in California. [Citations.] In other states, the matter of custody is reopened or subject to reconsideration upon the death of the custodial parent. (The leading case is *Jarrett v. Jarrett* (1953) 415 Ill. 126 [112 N.E.2d 694], where an award of custody was made to the mother; child lived with maternal grandmother; mother died; trial court awarded custody to maternal grandmother as against father; the Illinois Supreme Court affirmed.)" (*In re Marriage of Jenkens* (1981) 116 Cal.App.3d 767, 771-772, second italics added.) These cases are based on the premise that when a parent is awarded custody in a divorce proceeding, the order awarding custody has no force or effect when the parent dies "*for the simple reason there is no one upon whom it can operate or anyone in existence capable of asserting any rights thereunder*. (Italics added)." (*Id.* at pp. 772-773.)

In the case before us, Father and Mother's custody orders did not arise as part of Father's marriage nullity proceedings. As Mother concedes in the briefing, the children were placed in protective custody after she was arrested for felony child abuse. Mother served time in jail for this offense and is currently on probation. Mother acknowledges a juvenile court custody order awarded Father sole physical custody of the children and limited her contact with them to monitored visits once a week.

Our Supreme Court's opinion *In re Chantal S.* (1996) 13 Cal.4th 196 (*Chantal S.*), is instructive. In that case, the dependency proceedings were initiated based on evidence the father was violent and the mother was unable to protect the minor, Chantal. The court held a juvenile court, when terminating its dependency jurisdiction,

could issue an order conditioning visitation on a parent's participation in counseling without being bound by the requirements of Family Code section 3190, which governs family court counseling orders. (*Chantal S., supra,* 13 Cal.4th at p. 200.) It explained, "At the outset it is helpful to clarify the distinction between a 'juvenile court,' and its orders, and a 'family court,' and its orders. A 'juvenile court' is a superior court exercising limited jurisdiction arising under juvenile law. [Citation.] Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code. [¶] By contrast, 'family court' refers to the activities of one or more superior court judicial officers who handle litigation arising under the Family Code. It is not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties. [Citation.] [¶] The two courts have separate purposes. The family court is established to provide parents a forum in which to resolve, inter alia, private issues relating to the custody of and visitation with children. In that setting, parents are presumed to be fit and capable of raising their children. (Fam. Code, § 3061.) The juvenile court, by contrast, provides the state a forum to 'restrict parental behavior regarding children, . . . and . . . to remove children from the custody of their parents or guardians.' [Citation.] When, as in this matter, a juvenile court hears a dependency case under section 300 of the Welfare and Institutions Code, the court deals with children who have been seriously abused, abandoned, or neglected. The juvenile court has a special responsibility to the child as *parens patriae* and must look to the totality of a child's circumstances when making decisions regarding the child. [Citation.] Accordingly, although both courts focus on the best interests of the child, '[t]he *presumption of parental fitness that underlies custody law in the family court . . . does not apply to dependency cases*' decided in the juvenile court. [Citation.]" (*Chantal S., supra,* 13 Cal.4th at pp. 200-201, second italics added.)

Although Mother does not mention it, a dependent child may be taken from the physical custody of his or her parent *only* when the juvenile court finds clear and

convincing evidence there is "a *substantial danger* to the physical health, safety, protection, or physical or emotional well-being of the [child]." (Welf. & Inst. Code, § 361, subd. (c)(1).) The focus of the statute is on averting harm to the child. (*In re Jamie M*. (1982) 134 Cal.App.3d 530, 536.) Based on the final juvenile court custody order made in this case that removed the children from Mother's physical custody, we can infer the finding was made that Mother poses a substantial danger to her children.

When a court orders removal of a child from parental custody pursuant to Welfare and Institutions Code section 361, subdivision (c)(1), it must also determine if there is a noncustodial parent who desires to assume custody of the child. (Welf. & Inst. Code, § 361.2, subd. (a).) If the court places the child with that parent, it may, "Order that the parent become legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the child. The custody order shall continue unless modified by a subsequent order of the superior court. The order of the juvenile court shall be filed in any domestic relation proceeding between the parents." (Welf. & Inst. Code, § 361.2, subd. (b)(1).) This order is commonly referred to a juvenile court custody order.

In the *Chantal S.* case, the court explained a juvenile court custody order requiring counseling as a condition of visitation was not inconsistent with the court's termination of the dependency proceedings. "The juvenile court's determination, that continuation of dependency was at that time unnecessary for Chantal's protection, was in turn premised on the existence of the court's custody and visitation order. The juvenile court did not find that Chantal would not need protection if father had unconditional visitation rights or joint legal or physical custody. To the contrary, the juvenile court's order reveals clear continuing concerns about father's effect, even in supervised visits, on Chantal's well being. [Citation.]" (*Chantal S.*, *supra*, 13 Cal.4th at p. 204.)

The court explained, "Under father's reasoning, in order to impose counseling conditions on his visitation rights, the juvenile court would be required to

force Chantal and her mother to remain indefinitely in the juvenile court dependency system. As the present case illustrates, however, there are situations in which a juvenile court may reasonably determine that continued supervision of the minor as a dependent child is not necessary for the child's protection, and at the same time conclude that conditions on visitation are necessary to minimize, if not eliminate, the danger that visits might subject the minor to the same risk of physical abuse or emotional harm that previously led to the dependency adjudication. In such a situation, [Welfare and Institutions Code] sections 362.4 and 362[, subdivision] (c) authorize the juvenile court to issue an appropriate protective order conditioning custody or visitation on a parent's participation in a counseling program." (*Chantal S., supra*, 13 Cal.4th at p. 204.)

The court in *Chantal S.* held a juvenile court may make protective orders conditioning custody or visitation without any time limitations if the court feels the order necessary to shield the child and serve the child's best interest. (*Chantal S., supra*, 13 Cal.4th at pp. 204-205.) "'[A] presumption that joint custody is in the best interest of the minor is *inconsistent with the purposes of the juvenile court.* Although both the family court and the juvenile court focus on the best interests of the child significant differences exist. In juvenile dependency proceedings the child is involved in the court proceedings because he or she has been abused or neglected. Custody orders are not made until the child has been declared a dependent of the court and in many cases, such as this one, the child has been removed from the parents upon clear and convincing evidence of danger. The issue of parents' ability to protect and care for the child is the central issue. *The presumption of parental fitness that underlies the custody law in the family court just does not apply to dependency cases.* Rather the juvenile court, which has been intimately involved in the protection of the child, is best situated to make custody determinations based on the best interests of the child without any preferences or presumptions.' [Citation.]" (*Id.* at p. 206.)

It is important to keep in mind Mother had a full opportunity, with the assistance of appointed counsel, to litigate the juvenile custody order, throughout the dependency proceedings. As aptly stated by our Supreme Court, "[P]arents in juvenile court often have greater opportunity and ability, compared with those in family court, to litigate custody or visitation orders . . . . [I]n juvenile court proceedings the social services agency has the burden of presenting evidence to support its allegations and requested orders, the necessity for juvenile court jurisdiction and the need for imposition of therapy or other court-ordered programs. [Citation.] [Juvenile court] orders such as that at issue here are subject to the right of appeal [citation], and unlike family court litigants, indigent parents who appeal from juvenile court final orders have a right to appointed counsel on appeal [citation]." (*Chantal S.*, *supra*, 13 Cal.4th at p. 210.)

Given the many "distinguishing features of juvenile court and family court litigation" discussed in *Chantal S.*, and Mother's lack of legal authority to support her notion "there should have been an automatic reversion of . . . custody" despite being bound by a juvenile custody order, we find no reason to reverse Judge Hubbard's or Judge Salter's orders. In 2011, the juvenile court determined dependency jurisdiction could be terminated on the ground Father would be able to care for and protect the children on his own. It terminated jurisdiction on the premise there would be a protective order to prevent unmonitored or lengthy visits with Mother. Noticeably absent from Mother's briefing on appeal is any discussion of the juvenile court's special responsibility to protect the best interest of the child or its authority to fashion protective visitation orders directed to either parent to safeguard the child from danger. To adopt Mother's argument the family trial judge was required to "automatically revert" custody would require us to completely ignore the juvenile court's protective measures and potentially place the children in danger. This is a rule we cannot condone. We find no reason to disturb Judge Salter's order denying Mother's motion to void all prior orders to facilitate an immediate placement of the children in her custody.

We wish to make one final comment because we are concerned about the status of this case. The dependency statutory scheme has many rules designed to shield children from long delays in finding permanent homes. Except in limited circumstances, a parent is entitled to a maximum of 12 months of reunification services, with a possibility of six additional months, when a child is removed from a parent's custody. (Welf. & Inst. Code, § 361.5.) These time limits satisfy the goal of limiting the length of time a child has to spend their lives in uncertainty, waiting for a parent to become adequate. In the case before us, the juvenile court timely decided the best permanent plan for these children within *one year*, granting Father sole physical custody of the children and essentially removing Mother from the children's lives. It is disconcerting to see the matter has languished in the family court for nearly four years. We are unclear why the family court repeatedly continues the case to afford Mother additional time to become an adequate parent when the juvenile court was able to determine within a year the children would not be safe placed in Mother's physical custody (unless supervised).

From the very beginning of these family court proceedings, the children were adamant they did not want to be with Mother. She had abused them. They were afraid of her. They did not feel safe with her. Reunification efforts during the dependency proceedings failed. J. and D. did not want any contact with Mother. The juvenile court's order limiting Mother's visits to being supervised was a very clear sign Mother should not be given physical custody of the children. If there was any doubt in the court's mind, a psychologist later confirmed contact with Mother would be "detrimental." This expert did not recommend reunification. Yet, for two years the family law trial judge maintained the status quo of having the children "temporarily" reside with Brenda while the children participate in therapy. It appears from the many continuances and requests for additional reports from the therapists that the family law judge hoped the magic of time and counseling would eventually change everything. This

wait-and-see approach for such a long time period would simply not have been permitted in the juvenile court.

We also find it very alarming that in 2013, when Mother was allowed some unsupervised visitation for the first time since 2010, something clearly went wrong. We do not know what transpired given our limited record, but the family law court in October 2013 found grounds to stop ALL visitation between Mother and J. and appointed the child legal counsel presumably because there was a need for someone to protect her best interests. Six months later, a different trial judge was assigned to the case and his minute order suggests a return to the wait-and-see plan. In the May 2014 minute order, Judge Salter asked about a "temporary parenting schedule" and for "selection of a reunification therapist." Mother lost custody of her children (and has not advanced past monitored visitation) since April 2010. Needless to say, we are concerned the focus in these proceedings does not appear to be on the needs of the children for permanency and stability. We are unaware of any guardianship proceedings by Brenda. Therefore, we urge the family law court to consider the best permanent plan for these children as soon as possible and enter a final custody order.

III

The May 15, 2014, order is affirmed. Because Respondent did not make an appearance, we award no costs on this appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

THOMPSON, J.